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No. 683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TEXAS LIQUOR CONTROL BOARD, ET AL.,
Petitioners,

v.

AMMEX WAREHOUSE COMPANY, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Third Supreme Judicial District of Texas (pp. 41-52 of Petition) is reported at 384 S.W. 2d 768. The order of the Supreme Court of Texas refusing to review the judgment of the Court of Civil Appeals is not reported, but is contained in the original record which has been sent to this Honorable Court.

The judgment of the trial court is set forth on pages 53-56 of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The sole question presented in this case is:

> Whether the State of Texas is authorized *to prohibit* the liquor export businesses engaged in by Respondents; or, to state the same question differently, whether the Commerce Clause, the Supremacy Clause and the Export-Import Clause of the Constitution of the United States deny the State of Texas the power *to prohibit* liquor export businesses of the type engaged in by Respondents.

STATUTES AND REGULATIONS INVOLVED

The Texas statute involved in this case is Article 666-15 (7b), Vernon's Annotated Penal Code of Texas, which was enacted in 1963 and which is set forth in full on pages 6-10 of the Petition.

Numerous sections of the Tariff Act and regulations, together with corollary Internal Revenue Code provisions and regulations and other federal statutes, govern the manner in which Respondents conduct their liquor export businesses. Such federal statutes and regulations are as follows:

(1) Tariff Act of 1930, as amended, 46 Stat. 763, particularly §§ 308, 311, 553-558, 564, 565, 585, 586, 592, 594, 595, 623 and 646, being 19 U.S.C. §§ 1308, 1311, 1553-1558, 1564, 1565, 1585, 1586, 1592, 1594, 1595, 1623 and 1646.

(2) Internal Revenue Code of 1954, as amended, §§ 5232, 5242, 5243, 5247.

(3) Federal Alcohol Administration Act of 1935, as amended, 49 Stat. 977 (1935), §§ 3 and 4, being 27 U.S.C. §§ 203 and 204.

(4) Racketeering Act of 1948, as amended in 1961 by the addition of § 1a, 75 Stat. 498, being 18 U.S.C. § 1952.

(5) United States Customs Regulations, 19 C.F.R., Parts 4, 8, 12 (particularly 12.37), 18 (particularly 18.1, 18.2, 18.3, 18.5, 18.10, 18.16-18.24), 19 (particularly 19.1-19.15), 21, 23 and 25.

With the indulgence of the Court, Respondents will not copy those statutes and regulations herein, as it is undisputed and has been found as a fact by the courts of Texas that the U. S. Bureau of Customs supervises every aspect of Respondents' businesses.

STATEMENT

This case involves the impact of a recent Texas statute upon Respondents' liquor export businesses. The statute has been codified as Article 666-15(7b) of Vernon's Annotated Penal Code of Texas, but is commonly referred to as "House Bill 782".

In his Findings of Fact and Conclusions of Law, the trial judge described Respondents' businesses in considerable detail (Tr. 344-356).[1] In summary, the operations of all of the Respondents, except Border Bonded Warehouse,[2]

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[1] The Transcript in the original record before the Court will be referred to as "Tr.", and the Statement of Facts will be abbreviated "S.F."

[2] Respondent Border Bonded Warehouse sells liquor in wholesale quantities, rather than making most of its sales in amounts of one to three bottles as do the other Respondents, with most of its wholesale sales being made to certain of the other Respondents. When it does make export sales to Mexico, it does so in large quantities that are delivered at export lots maintained by the Customs Bureau. Counsel for Respondents understand that Petitioners agree that, if House Bill 782 is unconstitutional as to the other Respondents, it is also unconstitutional as to Border Bonded Warehouse. Consequently, no further account will be taken herein of the individual aspects of its business.

are as follows (S.F. 3-138, 161-162, 173-175, 181-185, 224-265, 301-307):

Respondents each own and operate one or more U. S. Customs Bonded Warehouses within the State of Texas. These warehouses are located at ports of entry into the Republic of Mexico (Brownsville, Hidalgo, Roma, Laredo, Eagle Pass and El Paso), in close proximity to the bridges used by persons entering Mexico. At such warehouses, Respondents maintain stocks of whiskey (and also cigarettes) on which no Federal taxes or duties and no Texas taxes have been paid, by virtue of the fact that the merchandise has been brought to the warehouses and stored there in bond, pursuant to applicable Regulations of the U. S. Customs Bureau.

In such warehouses, the whiskey is in the sole custody of U. S. Customs Officers who are stationed at the warehouses and work therein, more than 30 such Customs Officers being so employed. Under an arrangement approved by the U. S. Customs Bureau and governed by its Regulations, Respondents reimburse the United States for the salaries paid to the Customs Officers who work in their respective warehouses. Only the Customs Officers handle the whiskey stored in such warehouses.

The warehouses are located in buildings that are subdivided into a bonded warehouse area and a store area, with the two areas being connected by locked doors or other locked entrances, the locks being dual ones with one key being held by the Customs Officers and the other by Respondents' employees. Except for "bonded cartmen", Respondents' employees work only in the store areas and are not permitted to enter the warehouse areas. Dummy, empty bottles of whiskey, with holes bored in the bottoms thereof, are displayed in most of the store areas, together

with the prices for the whiskey represented by the bottles. No whiskey is kept in the store areas.

When a customer enters one of the buildings, he enters only the store area and is not permitted into the warehouse area. The Mexican Government permits persons entering the Republic of Mexico to bring in three bottles of liquor per person, duty-free. Consequently, Respondents' customers ordinarily order only from one to three bottles of whiskey, with at least 99% of Respondents' sales being in lots of three bottles or less. When a customer orders whiskey, certain forms approved by the U. S. Customs Bureau are filled out; the customer pays Respondents' employees for the whiskey; and he is given one of the forms as a receipt. Respondents' employees then give the other forms to the Customs Officers in their respective warehouses. The Customs Officers withdraw from the warehouse the kind and amount of whiskey called for in the forms, making appropriate entries in the warehouse records. They then deliver such whiskey to a U. S. Bonded Cartman (who ordinarily is an employee of Respondents, but who is also bonded by the U. S. Customs Bureau), and the cartman carries the whiskey in bond to the Customs station situated at the United States end of the international bridge.

When the customer arrives at the Customs station and is at a point where he is irrevocably committed to crossing the bridge into Mexico, either afoot or in a vehicle (i.e., a point where U. S. Customs and Immigration Officers will not permit him to turn around and return without crossing the bridge), he presents his receipt to the Customs Officer at the Customs station and is handed the whiskey that he has bought and paid for, the delivery being either by the Customs Officer or by the Bonded Cartman under supervision of the Customs Officer. The customer then carries the whiskey into Mexico.

When the Customs Officer at the Customs station is satisfied that the customer has transported the whiskey so delivered into Mexico, he signs a form certifying that the whiskey has been exported from the United States into Mexico, and this certification is placed with the other forms and records that are kept by the Customs Bureau, or are required by it to be kept, at each warehouse. As can readily be perceived, this entire procedure, in addition to being sanctioned by the U. S. Customs Bureau, is supervised and participated in by Customs Officers from beginning to end.

House Bill 782 requires Respondents to obtain a so-called "United States Bonded Liquor Export Permit" from the Petitioner Texas Liquor Control Board for each of their stores, for a fee of $750.00, and to purchase liquor only from wholesalers or manufacturers who also hold Texas permits. Of far greater importance, however, is the fact that House Bill 782 would permit Respondents to sell liquor only by delivering it:

> ". . . to a *public common carrier* for transportation, in compliance with such carrier's established rate schedule, into the country of export by such common carrier or by such common carrier's affiliated common carrier in the country of export, *for delivery to the purchaser at a designated address outside the continental limits of the United States* or for delivery to a named qualified person at a designated address outside the continental limits of the United States."[3]

The 53rd District Court of Texas, the Austin (Texas) Court of Civil Appeals, and the Supreme Court of Texas have all held that House Bill 782 is unconstitutional under the Constitution of the United States.

In its Findings and Conclusions, the trial court held:

> "I find and conclude that the Texas Liquor Control Act, as amended by the 1963 Amendment (House Bill

[3] Unless otherwise stated, all emphasis in this Brief has been added.

782, Acts of the 58th Leg., Ch. 108, p. 196), is unreasonable and is an undue burden on interstate and foreign commerce." (Tr. 362)

"Plaintiffs cannot continue their businesses if such Amendment is effective." (Tr. 359)

". . . the effect of House Bill 782 is not to regulate, but to prohibit, and the measure is so integrated that the severability clause affords no relief." (Tr. 362)

The Court of Civil Appeals stated:

"The trial court made extensive findings of fact and conclusions of law which we have read and considered and believe are supported by the record as a whole and justified by law." (384 S.W. 2d 768 at 772)

No opinion was handed down by the Supreme Court of Texas when it refused writ of error.

ARGUMENT

House Bill 782 Prohibits Respondents' Businesses, Rather Than Regulating Them

Throughout their entire Petition for Certiorari, Petitioners beg the basic question in this case by stating that House Bill 782 merely "regulates" Respondents' businesses and by couching their statement of the questions presented for review in terms of the power of the State of Texas "to regulate".

As is stated above, the trial court found that the effect of the statute is to prohibit, rather than to regulate, and the Court of Civil Appeals held that this finding by the trial court was supported by the record and is justified by law. Under the Constitution and statutes of Texas, only a trial court and a Court of Civil Appeals have fact-finding powers, a trial court having the power to find the facts initially and a Court of Civil Appeals having the power to determine whether the finding is supported by the evidence, Tex. Constitution, Art. 5, Sec. 6; Art. 1820, Vernon's Anno-

tated Texas Statutes; *Perry National Bank* v. *Eidson,* 161 Tex. 340, 340 S.W. 2d 483 (1960). Consequently, the only two Texas courts that have jurisdiction to determine the facts have found that House Bill 782 prohibits, rather than regulates.

This finding is abundantly supported by the evidence. To mention only one facet of the statute, House Bill 782 would permit Respondents to sell liquor to their customers only by transporting it into Mexico via a "public common carrier" and by having the common carrier deliver it to the customer "at a designated address" in Mexico.

Respondents' customers are primarily tourists entering Mexico and Mexican nationals reentering that country after working in the United States or visiting this country. Common sense alone reveals that House Bill 782 would destroy Respondents' businesses insofar as sales to tourists are concerned. Even if common carrier service was physically and economically available, how many tourists would purchase liquor from Respondents if they had to go to the trouble of having it sent across the border with all of the red tape involved in common carrier transportation, and how many tourists would have a "designated address" in Mexico at which the liquor could be delivered to them?

However, far more serious are the facts that, as found and concluded by the trial court:

> ". . . in all cases it would be an economic impossibility for Plaintiffs to comply with that portion of House Bill 782 which requires that liquor be delivered to a public common carrier for transportation into the country of export, if Plaintiffs are to continue in business, and . . . in some cases it would be a physical impossibility to comply with such requirement because such service by a public common carrier is not available." (Tr. 362)

One after another, the various owners of Respondents testified that they had attempted without success to find a

common carrier who would transport liquor into Mexico (S.F. 140-160, 162-163, 173, 174-175, 185-187, 189-190, 260-261, 263, 281-282, 305-306, 340-342, 428-429). The testimony clearly shows that transportation of all commodities across the border is handled by private trucks or vehicles, rather than by commercial vehicles, and that commercial vehicles refuse to cross the border (S.F. 140-160). Moreover, if liquor should be sent across the border in a commercial vehicle, it would be subject to Mexican customs duties, whereas lots of up to three bottles are duty free if carried into Mexico via private vehicle (S.F. 159-160).

The only evidence that it is theoretically possible to transport liquor into Mexico by common carrier came from an employee of REA Express. His testimony well supports the Findings and Conclusions of the trial court, especially as to economic impossibility. What the REA witness testified to was this:

1. That REA would accept a small shipment of liquor, consisting of one, two or three bottles, and issue a through bill of lading therefor for delivery into Mexico. The minimum cost for such a shipment would be $2.75 (S.F. 562, 565).

2. The payment of $2.75 would suffice to get the liquor transported from one of Respondents' warehouses on the border to the appropriate U. S. Customs export lot (S.F. 565).

3. Then, however, REA would make an additional minimum charge of $6.00 for clearing the shipment through U. S. Customs (S.F. 566-567).

4. After the shipment cleared U. S. Customs, a Mexican company named Fletes Pri would pick up the shipment and put it in the hands of the Mexican customs authorities. Then, according to the REA official (S.F. 567):

"A. A Mexican would then handle it through Mexican customs, just like we would have to handle it for American Customs.

"Q. Do you happen to know what the charges are for this service?

"A. No, I do not. We do not — *there is no way here that you can pay those here,* because we don't have . . . ."

Thus, the amount that would have to be paid to a Mexican customs broker is unknown. If it was the same amount as REA charged for clearing U. S. Customs, it would be an additional $6.00 per shipment. Moreover, as is said above, the charge by the Mexican customs broker cannot be prepaid on this side of the border.

5. Since Fletes Pri is a commercial carrier, Mexican duties would have to be paid upon the liquor, since the three bottle exemption that obtains when liquor crosses the border via private carrier would not be applicable. The amount of such duties is not known.

6. For its services, including transportation to points in Northern Mexico, Fletes Pri would charge an additional $2.00 (S.F. 569).

Consequently, for a shipment of one, two or three bottles of liquor across the border through REA Express, the tally sheet would be as follows:

$2.75 — Minimum charge by REA.
6.00 — Minimum REA charge for clearing customs.
? — To be paid to Mexican customs broker.
? — To be paid for Mexican duties.
2.00 — Minimum charge by Fletes Pri.

$10.75 plus $? ?

Hence, if a tourist or a Mexican national wished to purchase one, two or three bottles of liquor from one of the Respondents, and if House Bill 782 is applicable to their businesses, the only method shown by the record by which a common carrier could transport the liquor into Mexico would be for the purchaser to engage REA Express, and to pay it and Fletes Pri a minimum charge of $10.75 per shipment, plus unknown amounts for a Mexican customs broker and for Mexican duties, plus the inconvenience caused by having to arrange for a Mexican customs broker and the general inconvenience and delay caused by the entire cumbersome procedure.

Assuredly, this evidence buttresses the Findings and Conclusions of the trial court that in all cases it would be an economic impossibility for Respondents to attempt to conduct their businesses by using a common carrier as required by House Bill 782.

And this is not all.

The REA employee testified that his company offers service in the "larger towns" along the border, naming Brownsville, Laredo, El Paso, and McAllen (S.F. 559). His enumeration did not include Roma, Hildalgo and Eagle Pass, where some of the Respondents operate, and the undisputed evidence is to the effect that there is no common carrier service of any kind whatever available in the first two of those towns.

Moreover, House Bill 782 would require, not only that the shipment into Mexico be made by a common carrier, but that such carrier deliver the liquor "to the purchaser at a designated address outside the continental limits of the United States." The REA employee finally admitted in his testimony that his company and Fletes Pri make such deliveries to designated addresses only at five cities in all of

Mexico, namely Mexico City, Guadalajara, Monterrey, Puebla and Torreon (S.F. 563-564). It will be noticed that this enumeration does not include any of the Mexican border cities, or a host of other large cities in the interior of Mexico. Consequently, except for the five cities named, a purchaser who desired to ship liquor into Mexico via REA and Fletes Pri would be unable to have the liquor delivered to him at his own address and would be required to pick up the liquor at a Fletes Pri warehouse (S.F. 563-564, 569).

The net result of all of this is that, if House Bill 782 is applicable to Respondents and if Respondents should struggle to continue their businesses under such statute:

1. They would be directed by the statute to make their deliveries into Mexico by common carrier, whereas in fact, with the possible exception of REA Express and Fletes Pri, there is no such common carrier service available along the border, and even REA service is unavailable in Roma and Hidalgo.

2. If they should attempt to use REA and Fletes Pri where such service is available, any customer so economically unwise as to purchase even a single bottle of liquor from Respondents would have to pay the cost of the liquor, plus minimum charges of at least $10.75, plus unknown charges for a Mexican customs broker and Mexican duties, in order to even get the liquor into Mexico.

3. And then, unless the purchaser happened to have an address in one of the five Mexican cities listed above, he would be unable to have the liquor delivered to him at his Mexican address.

To claim that Respondents could continue to operate their businesses under such conditions is to strain credulity to the point of absurdity. As the trial court found and concluded, in all cases it would be an economic impossibility

for Respondents to continue their businesses under House Bill 782, and in most cases it would also be a physical impossibility. As the trial court also found and concluded, "the effect of House Bill 782 is not to regulate, but to prohibit".

All Questions In This Case Were Decided In Idlewild and In California Ammex

As the courts of Texas have recognized, every aspect of this case is covered by the decisions in *Hostetter* v. *Idlewild Bon Voyage Liquor Corporation,* 377 U.S. 324, 84 S. Ct. 1293, 12 L. Ed. 2d 350 (1964), and *Department of Alcoholic Beverage Control for the State of California* v. *Ammex Warehouse Company of San Ysidro, Inc.,* 224 F. Supp. 546 (Cal. 1963) aff'd 378 U.S. 124, 84 S. Ct. 1657, 12 L. Ed. 2d 743 (1964), referred to herein as "California Ammex".

Both *Idlewild* and *California Ammex* involved in-bond sales of small quantities of liquor for export, as does the case at bar. In those cases, as in the instant case, the liquor was sold from U. S. Customs Bonded Warehouses, and every phase of the sale and export was under the supervision of U. S. Customs Officers.[4]

In the *Idlewild* case, the New York liquor laws were worded in such fashion that they would, by their very terms, prohibit this kind of business. In *California Ammex,* the California statutes contained provisions which could have

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[4] In the Petition it is claimed that Respondents have the wrong kinds of U. S. Customs Bonded Warehouses for their businesses, and that they are operating in violation of federal laws and regulations (pp. 23-25). It is significant that the U. S. Customs Bureau is not making any such complaint. On the contrary, the evidence shows that, day in and day out, the Customs Bureau and Customs Officers are supervising Respondents' businesses, and there is no hint of any feeling on their part that Respondents' operations are improper.

been applied to the business and which purportedly would have regulated such business. In fact, however, if the purported regulations were applied to a business, the net effect would have been to cause the business to close its doors. Consequently, the three judge Court began its opinion with these words:

> "This case involves the question as to whether the State of California, through the Department of Alcoholic Beverage Control may prevent the plaintiffs, *under the guise of regulation,* from carrying on a proposed business which plaintiffs claim is protected by the Commerce and the Export-Import Clauses of the United States Constitution." (224 F. Supp. at 548)

And the Court held:

> ". . . the State *by purported regulation* may not prohibit a business whose activities are protected under the Commerce Clause." (224 F. Supp. at 552)

Precisely the same question is involved in the case at bar. House Bill 782 purports to sanction and regulate businesses such as those conducted by Respondents. In truth and in fact, however, if House Bill 782 is applicable to Respondents' businesses, the result will be, not to regulate the businesses, but to destroy them and prevent their operation.

Consequently, in this case, as in *California Ammex,* the courts are called upon to determine whether, "under the guise of regulation", the State can prevent the carrying on of this kind of business. In this case, as in *California Ammex,* the situation is one in which "the State by purported regulation" is striving to "prohibit a business whose activities are protected under the Commerce Clause". The only difference between the two situations is that, in *California Ammex,* the California liquor authorities were can-

did enough to admit that, if their purported regulations were applied, the businesses would be required to close their doors, whereas in the case at bar Petitioners have shown a singular lack of any similar candor.

Petitioners' labored attempts to fabricate other distinctions between this case and the two prior cases scarcely require comment. It is true that, as Petitioners point out (Pet. 25), in *Idlewild* the customer did not obtain physical custody over the liquor until he landed on foreign soil, whereas in the instant case the liquor is handed to the customer on Texas soil, a few feet this side of the boundary. The same attempted distinction was urged in *California Ammex,* and the Court shrugged it off, saying ". . . the factual distinction between the two cases is a distinction without a difference" (224 F. Supp. at 556).

It is also true that, in *California Ammex,* the liquor was delivered to the customers in a sixty foot strip adjoining the border, over which California and the United States had concurrent jurisdiction. However, the Court in that case did not base its decision upon the fact that the liquor was delivered within that strip. Rather, the Court said:

> "Factually the case [Idlewild] varies only in one respect from the case before us. In our case the liquor is handed to the purchaser by a Customs Agent at the time he crosses the border into Mexico. We have *found* that although the purchaser has physical custody of the liquor for a few moments until he crosses the border, and the liquor is at all times under the supervision of the Customs Agent.
>
> "And we have *concluded* that the purchaser has only the physical custody of the liquor and that the legal possession of the liquor remains in the Customs Agent until the moment the purchaser crosses the border.
>
> ". . .

> "In the Idlewild case, the passenger received the liquor upon arrival at the foreign destination. In our case, he receives it the moment before he crosses the border under the supervision of a Customs Agent who supervises his departure and the exportation of the liquor from the United States into Mexico and certifies to its exportation." (224 F. Supp. at 556, emphasis by the Court)

In the situation at bar, the record is replete with evidence to the effect that, although physical possession of the liquor is delivered to the purchaser a few feet this side of the border and a few seconds before the purchaser crosses the border, it is delivered at a point where the purchaser is not permitted to turn back and must cross the border; and the Customs Officer sees that he does cross and then certifies that the liquor has been exported from Respondents' bonded warehouses into Mexico (S.F. 43, 48, 58, 60-61, 68-70, 103, 110). The trial court so found (Tr. 355). Consequently, as was true in *California Ammex,* in delivering liquor to their customers under such circumstances Respondents are engaged in the business of exporting liquor just as certainly as if they had made in-bond shipments from their warehouses for their customers to pick up on the other side of the border.

Petitioners also paint a horrendous picture of how it might be possible for the liquor to be diverted for use within Texas (Pet. 26-28, 34-36). To take account of these fancied contingencies, a court would have to indulge in the assumption that the U. S. Customs Officers will not properly perform their duties. If a purchaser from Respondent fails to cross into Mexico after the liquor is handed him, the Customs Officer violates his duty if he permits the customer to return to Texas without crossing into Mexico. If a purchaser manages to smuggle liquor back into Texas, then again the Customs Officers have been derelict. It is difficult to believe that this Court will assume such derelictions.

This entire matter was well summed up by Mr. Justice Hughes of the Court of Civil Appeals when he said:

> "If the Liquor Control Board, its agents, and all of the interested liquor dealers along the border have not during this controversy been able to show that one bottle of liquor certified by the United States export official as having been exported to Mexico was not in fact exported or that it has in some manner been consumed or re-sold in Texas, then *it seems to me that the patently foolproof method used by appellees to export this liquor is in fact foolproof."*[5] (384 S.W. 2d at 772-773)

Additionally, the same Justice said:

> "I do not believe that the fact of 'delivery in Texas' under the described circumstances is any more proof of diversion, or danger of diversion, than in the Ammex-California case where delivery was made in a strip under the joint jurisdiction of the State and Federal Governments." (384 S.W. 2d at 773)

In *Idlewild,* this Court held that a state cannot prohibit the type of business engaged in by Respondents. In *California Ammex,* it affirmed a decision wherein such a prohibition was accomplished under the guise of regulation. In invalidating House Bill 782, the Texas courts have properly followed the path blazed by this Court in *Idlewild* and *California Ammex.*

House Bill 782 Also Offends The Export-Import Clause

The Export-Import Clause of the Federal Constitution (Art. I, § 10, cl. 2) provides that:

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, ex-

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[5] The only proof of any illegal use of liquor sold by Respondents was proof that one of the counsel for Petitioners purchased a bottle of Scotch, crossed into Mexico, and then brought the bottle back into this country, paying taxes thereon. This was a violation of federal law, since such a traveler is permitted to import only liquor purchased in Mexico, and that liquor was not so purchased. Nevertheless, Petitioners have boldly brought this bottle of Scotch before the Court as an original exhibit.

> cept what may be absolutely necessary for executing its inspection Laws."

As the Court pointed out in footnote 3 of its opinion in *Idlewild,* this Clause was not involved in that case because the State of New York had not attempted to levy any tax or fee upon the business there involved. For the same reason, the Clause was of no significance in *California Ammex.* However, the Clause is directly relevant in the case at bar.

As is stated above, House Bill 782 would require Respondents to obtain Texas licenses and pay fees of $750.00 per store per year for the privilege of conducting their export businesses. It was early held in *Brown* v. *Maryland,* 12 Wheat. 436, 6 L. Ed. 678 (1872), that the levying of such a license fee upon a business engaged in selling goods for export or import violates this Clause. The same holding was made in *Welton* v. *Missouri,* 91 U.S. 275, 23 L. Ed. 347 (1876), with the Court giving as its rationale the fact that a license tax imposed upon the business of selling goods is the same as a tax upon the goods themselves. Upon the basis of the same logic, similar license fees have been invalidated under the Export-Import Clause in *Collins* v. *Bay City Export Lumber Co.,* 70 So. 2d 273, 260 Ala. 308 (1954), and *State* v. *Pratt,* 9 Atl. 556, 59 Vt. 590 (1887).

Petitioners disavow any intent to inspect the liquor which Respondents hold in bond (S.F. 505). Consequently, the $750.00 license fee imposed by House Bill 782 cannot be sustained as an inspection fee. Rather, the tax is one imposed upon the privilege of engaging in the business of exporting, including the making of sales for export, and, under the above authorities, is unconstitutional.

Accordingly, in addition to its infirmities under the Commerce Clause and the Supremacy Clause, House Bill 782 is also unconstitutional when measured by the Export-Import Clause.

CONCLUSION

The Petition for Certiorari is strewn with intemperate statements that, if the decisions below stand, Texas has lost its power to regulate a segment of the liquor industry. It is manifest that this is not true. In response to similar cries, the Court said in *California Ammex:*

> "The case before us does not, therefore, involve reasonable measures aimed at preventing unlawful diversion or use of alcoholic beverages within California . . . It seeks to terminate, this it cannot constitutionally do . . . If the State of California sees fit to pass statutes and regulations directed towards reasonable regulation of plaintiffs' business, this will be another case for another day." (224 F. Supp. at 557)

Likewise, if the State of Texas should ever make a bona fide attempt to regulate Respondents' businesses, that too "will be another case for another day". In House Bill 782, it has sought only to terminate. This it cannot constitutionally do.

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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